

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 31, 2008

Case Number: TSO-0689

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ A DOE Local Security Office (LSO) suspended the individual’s access authorization pursuant to the provisions of Part 710. In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual’s access authorization should be restored. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not restore the individual’s access authorization at this time.

I. Background

On January 31, 2007, the LSO received the report of a background investigation of the individual, who at that time held a security clearance. Exhibit 14. Because of information related to the individual’s history of alcohol use and incidents of domestic violence, the LSO conducted a PSI with the individual on April 22, 2008. *Id.*; see Exhibit 5. As the security concern remained unresolved after the PSI, the LSO requested that the individual be interviewed by a DOE consultant psychiatrist (DOE psychiatrist). Exhibit 14. The psychiatrist interviewed the individual on June 19, 2008. See Exhibit 3 (June 20, 2008 report of DOE psychiatrist). The LSO ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. See 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual has been, or is a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist as

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

alcohol dependent or as suffering from alcohol abuse. Exhibit 1 at 4-5 (citing 10 C.F.R. § 710.8(j) (Criterion J)), and that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security. *Id.* at 5-6 (citing 10 C.F.R. § 710.8(l) (Criterion L)).

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on November 3, 2008. At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the DOE psychiatrist and the individual. The DOE Counsel submitted 14 exhibits prior to the hearing.

II. Regulatory Standard

A hearing under Part 710 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," i.e., "to have the substantial doubt regarding eligibility for access authorization resolved." 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).² After due deliberation, I have determined that the individual's access authorization should not be restored. The specific findings that I make in support of this decision are discussed below.

III. The Notification Letter and the Security Concerns at Issue

As the basis for security concerns under Criterion J, the Notification Letter cites the opinion of the DOE psychiatrist that the individual meets criteria for Alcohol Abuse, as set forth in the Diagnostic

² Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

and Statistical Manual of the American Psychiatric Association, Fourth Edition, Text Revision (DSM-IV). The Notification Letter also alleges that the individual:

(1) admitted he became intoxicated once every four months in 2007 after consuming eight or nine beers, approximately four times in early 2008 after consuming eight or nine beers along with hard liquor, and again three weeks before his April 22, 2008 PSI, after consuming five beers.

(2) in April 2007, had a Restraining Order filed against him by his former spouse due to his third alcohol-related domestic abuse incident in that same month.

(3) in April 2007, was ordered to attend his third court-ordered anger management treatment consisting of 52 weeks of counseling.³

(4) on September 12, 2003, he was arrested and charged with Driving Under the Influence (DUI) after consuming two or three beers.

(5) on June 13, 2002, he had a Restraining Order filed against him by his former spouse due to an alcohol-related domestic violence incident, and attended court-ordered anger management counseling once every one or two weeks until November 2002.

(6) between 1983 and 2007, he admitted that he drove his vehicle once or twice a year knowing that he was intoxicated.

(7) admitted that his use of alcohol was a contributing cause of his failed marriage.

(8) admitted that his former spouse told him he had a problem with alcohol.

(9) admitted that, between 1999 and 2007, he missed work three times because he was hung over, most recently in the summer of 2007.

³ In his hearing testimony, the individual stated that his court-ordered anger management treatment in 2007 was not his third, but rather only his second, the first being in 2001 or 2002. The dispute here appears to stem from documents referred in the DOE psychiatrist's evaluation, Exhibit 3 at 5; *see* Tr. at 45, and in the 2008 PSI, Exhibit 5 at 47, 77, indicating that the individual was also ordered by a court to attend anger management treatment in 2006, after the incident in which he kicked in the door of his ex-wife's residence. The individual testified that he does not recall being ordered to attend such treatment following the 2006 incident. Tr. at 46. Further, the DOE Counsel stated at the hearing that he "looked through the duplicate file and the evidence was not in here. And it mentions three sort of unspecified court ordered appearances, but it's hard to track it." *Id.* at 45.

As such, I find that this particular allegation in the Notification Letter is valid, but not conclusively so to the extent that it refers to a "third" court-ordered anger management treatment. However, because the 2006 incident did not involve the individual's use of alcohol, *id.*, I find that the dispute as to whether the court-ordered treatment was the individual's second or third is not relevant to the concerns cited under Criterion J. *See* 10 C.F.R. 710.27(c) (requiring the Hearing Officer to "make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter and the significance which the Hearing Officer attaches to such valid allegations").

Exhibit 1 at 4-5.

The excessive consumption of alcohol is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines) at ¶ 21.

As the basis for security concerns under Criterion L, the Notification Letter alleges that the individual:

(1) had an Order of Protection filed against him by his former spouse on February 23, 2006, after he kicked in the door of her residence.

(2) admitted domestic violence incidents occurred twice a year with his former spouse from 1987 to 2002.

(3) continues to drink to excess, and has had three alcohol-related arrests/incidents despite signing DOE security acknowledgments in 2000, 2001, and 2006, certifying that he understood that using alcohol habitually to excess and/or a diagnosis of Alcohol Abuse could result in the loss of his security clearance.

(4) during the psychiatric evaluation by the DOE psychiatrist and at his 2008 PSI, admitted that he continued to drink to intoxication once every four months and drove after being intoxicated on at least two occasions, after giving DOE assurance during a 2004 PSI that he would no longer drink and drive or become intoxicated in the future.

(5) admitted to continuing his consumption of alcohol in violation of a condition of release after his 2003 DUI arrest.⁴

Id. at 5-6.

⁴ The individual did not recall there being a condition of abstention from alcohol use when he was placed on probation after his DUI conviction. Tr. at 61, 62. Though the exhibits presented by the DOE did not include any documentation of this condition of release, the DOE psychiatrist's report referenced an April 7, 2004, judgment that "included 364 days of unsupervised probation, whose requirements included that 'Defendant shall not possess alcohol or controlled substances or frequent where sold.'" DOE Exhibit 3 at 5. On the other hand, in the portions of the psychiatrist's report cited in the Notification Letter in support of this allegation, the psychiatrist concluded only that it "seemed possible that he did drink (infrequently) in violation of his Conditions of Release and/or unsupervised probation requirements." *Id.* at 11. At the hearing, the individual did not recall whether he consumed alcohol in the year after being put on probation. Tr. at 63.

Though there is no primary source documentation in the record establishing that there was the condition of release alleged in the Notification Letter, the DOE psychiatrist's report is strong evidence confirming its existence. However, I find no evidence in the record indicating that the individual did, in fact, consume alcohol during his probation.

After an individual has been put on notice that specific behavior can jeopardize his eligibility for a security clearance, engaging in such behavior raises questions regarding the judgment of the individual, beyond those that would be raised in the absence of such notice. The individual's involvement in incidents of domestic violence also raises questions as to his judgment. Conduct demonstrating poor judgment in turn raises legitimate concerns regarding an individual's reliability in the security context. *Id.* at ¶ 15 ("Conduct involving questionable judgment, . . . can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.").

IV. Hearing Officer Evaluation of Evidence

The DOE psychiatrist's diagnosis of the individual, and his undisputed conduct, as set forth in the Notification Letter, clearly raise legitimate security concerns.⁵ I now must determine whether these concerns have been resolved such that, "after consideration of all relevant information, favorable and unfavorable, . . . the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). For the reasons set forth below, I find that the concerns raised in this case remain unresolved. I therefore do not find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest.

A. Criterion J – Alcohol Use

In his testimony, the DOE psychiatrist explained the basis for his diagnosis of Alcohol Abuse, referencing the diagnostic criteria set forth in the DSM-IV, and citing (1) the individual's consumption of alcohol to intoxication after the DOE put him "on alert" during the 2004 PSI that it was concerned about his excessive drinking, Tr. at 10-11; (2) the DOE psychiatrist's belief that the individual's 2003 DUI arrest "almost certainly indicates there have been many others occasions when" the individual drove while intoxicated, the psychiatrist noting the individual's admission of other such occasions, *id.* at 11-12; (3) the individual's alcohol-related legal problems, specifically the DUI and those related to incidents of domestic violence, *id.* at 12; (4) problems in his marriage, and with his ex-wife after the marriage ended, related to his use of alcohol. *Id.* at 12-13.

Other than disagreeing with one of the factual characterizations of the DOE psychiatrist as to whether the individual admitted to recently driving while intoxicated, *id.* at 27, the individual did not present any evidence that would undermine the psychiatrist's diagnosis of alcohol abuse, and I find no reason to discount the validity of this expert testimony. Given this diagnosis, the question becomes one of prognosis, i.e., the likelihood that the individual will consume alcohol to excess in the future, the potential consequences to national security of such behavior not being in dispute. Adjudicative Guidelines at ¶ 21.

The Adjudicative Guidelines list four conditions that could mitigate the security concern associated with excessive alcohol consumption:

⁵ See 10 C.F.R. 710.27(c). Except where noted elsewhere in this decision, I find that the record in this case supports the validity of each of the allegations contained in the Notification Letter. *Id.*

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Id. at ¶ 23.

Relevant to the first condition listed above, the DOE psychiatrist opined that the individual “was doing better in terms of his drinking problem. The severe episodes were receding into the past. His DWI was an isolated incident, 2003. His drinking was getting less frequent, . . .” *Tr.* at 15. This is clearly a factor in the individual’s favor. Moreover, the individual’s recent pattern of alcohol use could fairly be described as more “responsible,” and an attempt to overcome his problem, factors to be considered under the second condition set forth in the Adjudicative Guidelines, as applied to alcohol abusers. *Id.* at 19 (testimony of DOE psychiatrist that the individual “was reducing his drinking. He didn’t drink as much compared to what he used to drink. He was drinking a lot less. So I think he justifiably thought he was taking some steps towards addressing the problem.”).

Somewhat favorable is the fact that the individual appears to be beginning to acknowledge his problems with alcohol, albeit a bit grudgingly. The record reflects no such acknowledgment leading up to the hearing, and the individual began the hearing flatly denying that he had a problem with alcohol. *See, e.g., Tr.* at 15 (testimony of psychiatrist that individual “did not think he had a significant alcohol problem at the time I saw him”); *id.* at 34 (“I still feel I don’t have a problem with drinking”); *id.* at 41 (“I feel I’m not an abuser of alcohol, I mean, I don’t drink very often.”). To the individual’s credit, however, he showed some signs of recognition of his problem toward the end of the hearing. *Id.* at 52 (“I guess it has been a problem, according to the paperwork when I actually read it out and say every time I got into it with my ex-wife or something”); *id.* at 78 (“I never felt that was a problem, but apparently it is, because like where I am today, it brought me to this point.”).

Perhaps because the seriousness of the issues he faces has only recently begun to dawn on him, the individual has not taken the further step of seeking treatment for his alcohol problem. At a pre-

hearing telephone conference, in the context of a discussion of the importance of expert testimony in these cases, the DOE Counsel suggested that the individual consider contacting his employer's Employee Assistance Program. Memorandum of Pre-Hearing Telephone Conference (November 18, 2008). The individual testified at the hearing that he had done so, but that the person to whom he spoke "mentioned to me -- kind of discouraged me -- he mentioned I would probably have to join AA meetings and go to like AA where you have a problem with alcohol. I felt that I didn't have a problem." Tr. at 42. As such, the mitigating conditions in the Adjudicative Guidelines pertaining to participation or completion of a treatment regimen are not present in this case.

That the individual has not sought treatment was one of the factors precluding a favorable prognosis by the DOE psychiatrist, another potential mitigating condition set forth in the Guidelines. The DOE psychiatrist's report stated that, to show evidence of rehabilitation or reformation, the individual would "need to have some desire to enter into treatment." DOE Exhibit 13 at 12. The psychiatrist recommended that the individual remain sober for one year and complete a "treatment regimen such as Alcoholics Anonymous, SMART, or individual counseling, attended . . . on a weekly basis or as recommended by his individual counselor." *Id.*

Thus, while recognizing the favorable trends in the individual's drinking patterns, the DOE psychiatrist testified that he "felt that clinically the steps weren't enough to say that, yes, he's now rehabilitated from his problem. He's reformed, and there is essentially a low risk that he's going to run into problems again." Tr. at 19-20. After listening to the individual's hearing testimony, the DOE psychiatrist characterized the risk going forward as

[m]oderately high of having problems of excessive drinking, mainly because I still don't think he seems to think he has a problem. He still thinks he can drink occasionally without a risk of running into problems with it, therefore I think he's going to continue to drink occasionally. That being the case, I think that there is a high risk that one of those times when he's under stress or at a big party or something like that, that the one drink will turn into more, and given his history, I think that could cause problems.

Id. at 74.

Considering all of the factors related to the individual's use of alcohol in the past, including the presence or absence of the various mitigating conditions set forth in the Adjudicative Guidelines, I cannot conclude at this time that the risk of the individual consuming alcohol to the point of intoxication in the future is low enough to be acceptable. Thus, I do not find that the concerns raised in the present case under Criterion J have been resolved.

B. Criterion L - Judgment

As noted above, conduct demonstrating poor judgment raises legitimate questions regarding an individual's reliability in the security context. Adjudicative Guidelines at ¶ 15 ("Conduct involving questionable judgment, . . . can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."). The relevant conduct in this case relates to incidents of

domestic violence involving the individual and his ex-wife, and the individual's use of alcohol despite his knowledge that this was of concern to DOE.

Of the six mitigating conditions set forth in the Adjudicative Guidelines pertaining to concerns arising from personal conduct, two are potentially relevant in the present case.

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

Adjudicative Guidelines at ¶ 17.⁶

Regarding the incidents of domestic violence, the DOE psychiatrist noted that

the only relationship in which he had these episodes of domestic violence were with his ex-wife, It sounded like [his ex-wife] may have been a handful, especially if you were intoxicated. And he had completed that relationship, and they were getting along much better. He had moved on to a new relationship. She had move on to a new relationship, so that was sort of a positive thing for him in that those relationship-based problems appeared to have been solely related to his relationship with his ex-wife, . . . and he had moved on to new relationships in which things were going better.

Tr. at 16. To the extent, then, that the episodes of domestic violence were limited to the circumstances of his relationship with his ex-wife, and the stressors associated with that relationship, such episodes may arguably be less likely to occur in the future.

However, in the security context, there is a larger issue about the individual's judgment that goes beyond whether the individual will be involved with domestic violence in the future. In this regard, there remains a lingering question regarding the individual's judgment under stress. This concern may be partially resolved with any steps the individual may take in addressing his problematic use of alcohol, since at least some of the events in question occurred after the individual had been drinking. Nonetheless, not all of these incidents involved the use of alcohol.

⁶ The other four mitigating conditions listed pertain to cases where an individual has failed to cooperate with the security clearance process, or has omitted, concealed, falsified information, *id.* at ¶ 17(a),(b), is vulnerable to exploitation, manipulation, or duress, *id.* at 17(e), or has associated with persons involved in criminal activities. *Id.* at ¶ 17(f).

One troubling example is when the individual kicked in the door of his ex-wife's residence in 2006. At the hearing, the individual explained that he shared custody of his two girls with his ex-wife. During the week in question, though it was his turn to have the girls with him, his ex-wife "calls me up crying and said she was really hurting because her aunt had passed away, and if she could have the kids to be with her, and she really needed them to be with her. And I said, okay, I'll let you have the girls." Tr. at 33. However, while on the way to work, the individual noticed his ex-wife's car parked at her boyfriend's house. *Id.* After then going to his ex-wife's house and to her mother's house and not finding his girls there, he returned to his ex-wife's residence, where he "heard noise in the house, and I figured my girls were there. I knocked and knocked, they wouldn't come. I kicked in the door and the door pops open. I was upset." *Id.* The individual has offered no explanation for this extreme reaction that would mitigate the obvious concerns it raises regarding his inability to temper his reactions with sound judgment.

I am relatively less concerned about the behavior cited under Criterion L that does not relate to domestic violence. The record contains three DOE security acknowledgments that the individuals signed in 2000, 2001, and 2006. Exhibit 8. In each case, the individual attested to his understanding that his "user of alcohol habitually to excess, . . . could result in the loss of my DOE access authorization." *Id.* However, the DOE psychiatrist, who described the phrase "user of alcohol habitually to excess" as "very clumsy grammar and vague terms" stated his opinion that the individual "was asked is he a user of alcohol habitually to excess, no, he was not. Most of the times when he drank he would not drink to excess, maybe every four months." Tr. at 72. Thus, if the signing of the security acknowledgement represented the individual's commitment to refrain from the behavior it describes, it is not at all clear that the individual violated that commitment, and even less likely that any such violation would have been committed knowingly. *See id.* at 65 (testimony of individual that does not think he used "alcohol habitually to excess" after signing the security acknowledgments).

Nonetheless, each of the security acknowledgements, as well as the 2004 and 2008 PSIs, clearly put the individual on notice that the excessive use of alcohol is of concern to DOE. That an individual provided such notice repeatedly would then continue to use alcohol occasionally, if not habitually, to excess is on its face evidence of poor judgment. On the other hand, as noted above, the DOE psychiatrist also cited this same behavior as a basis for his diagnosis of alcohol abuse. This conduct, therefore, might be better understood as part of the individual's problems with alcohol as discussed in the previous section of this decision. To the extent that the individual had taken further steps to address that issue, the concern under Criterion L stemming from his alcohol use might well be resolved.

It is similarly possible that the individual could resolve his obvious anger management issues through further counseling. I do take into consideration that the individual does not deny that the alleged incidents occurred, and that he has been through anger management treatment at least twice, albeit mandated by a court order. Adjudicative Guidelines at ¶ 17(d). At this point, however, I am not convinced that the concerns under Criterion L arising from the individual's past conduct have been resolved.

VII. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria J and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to sufficiently mitigate the security concerns advanced by the LSO. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: